Supreme Court, U.S.
FILED

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No. 98-____

In the Supreme Court of the United States

OCTOBER TERM, 1998

HUMBERTO JULIO LOPEZ,
Petitioner,

v.

UNITED STATES IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Humberto Julio Lopez
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Rockville, MD 20853
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Pro Se

50 pp

QUESTION PRESENTED

1. Whether the Fourth Circuit erred as a matter of law in determining that Petitioner did not meet the statutory criteria necessary to establish asylum pursuant to section 208(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158(a).

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Humberto Julio Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unreported decision dated April 30, 1998, and is reproduced in Appendix ("App.") A at 1a-2a. The order of the Court of Appeals denying rehearing and rehearing en banc is not reported, and is reproduced at App. B at 3a-4a. The decision of the Board of Immigration Appeals dated August 6, 1997 is an unreported decision, and is reproduced in App. C at 5a-12a. The oral decision of the

Immigration Judge is an unreported decision, and is reproduced in App. D at 13a-26a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1998. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on July 14, 1998. The jurisdiction of this Court to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(l).

STATUTORY PROVISION INVOLVED

This case involves section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Humberto Julio Lopez is a thirty-one year old male who is married with two United States citizen children, ages eight and four. Petitioner, a native and citizen of Peru, entered the United States on April 15, 1986, without inspection, in order to avoid threats to his life from the guerilla faction known as the Shining Path.[1] Petitioner's brother, sister and brother-in-law also live in the United States. Since his arrival in the United States, Petitioner has

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[1] The record evidence, as found by the Immigration Judge, shows that Peru has been afflicted with violence brought about by an insurrectionary movement known as the Sendero Luminoso, or "Shining Path." App. D at 15a.

never been arrested for any crime and has been employed as a painter and a part-time newspaper deliverer.

Petitioner fled Peru in 1986 to avoid death threats. The undisputed evidence demonstrated that the Shining Path repeatedly sought to harm Petitioner because he was mistaken for his brother, with whom Petitioner has a close physical resemblance and who is a former Peruvian police officer living in Canada since 1985 to avoid persecution by the Shining Path. The Shining Path previously had targeted Petitioner's brother because of his service with the police. When the threatened harm initially began, Petitioner moved away and lived with his uncle and other relatives. Not wanting to impose himself on his relatives, however, Petitioner eventually returned to his own home. But the threatened harm continued, and Petitioner eventually fled Peru and came to the United States to avoid the persecution.

B. Proceedings

On September 10, 1992, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause against Petitioner, alleging that he was deportable under section 241(a)(1)(B) of the INA, 8 U.S.C. § 1251(a)(1)(B), for entering the United States without inspection. At a March 12, 1993 immigration hearing, Petitioner admitted the factual allegations in the Order to Show Cause, and the immigration judge found Petitioner deportable based on those admissions. At that time, Petitioner stated his intention to apply for four forms of relief: asylum,[2] withholding of deportation,[3] suspension of

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[2] Under 8 U.S.C. § 1158(a), the Attorney General (whose authority in these matters is delegated to the INS, with review by the BIA) has discretion to grant asylum to an alien who

deportation[4] and voluntary departure.[5] At a subsequent hearing on September 28, 1993, an Immigration Judge

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qualifies as a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42)(A), which defines "refugee" as follows:

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

[3] 8 U.S.C. § 1101(a)(42)(A), provides that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

[4] Pursuant to 8 U.S.C. § 1254(a), "the Attorney General may, in his discretion, suspend deportation [of an alien who] has been physically present for a continuous period of not less than seven years immediately preceding the date of [the suspension application] and proves that during all of such period he was a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien."

[5] 8 U.S.C. § 1254(e)(1) provides that the Attorney General, in her discretion, may "permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation" provided certain statutory criteria are met.

entered an interlocutory order denying Petitioner's application for withholding of deportation, but withheld any judgment on Petitioner's asylum application until after further testimony. The Immigration Judge subsequently denied Petitioner's application for asylum on January 14, 1994, but granted Petitioner's application for voluntary departure.

1. Decision of the Immigration Judge

The Immigration Judge denied Petitioner's applications for asylum, withholding of deportation, and suspension of deportation pursuant to an oral decision dated January 14, 1994. In that decision, the Immigration Judge found that Petitioner's testimony was credible, but nevertheless concluded that he was ineligible for asylum because he had failed to demonstrate that he "possessed an immutable trait or belief that was of adverse interest to a potential persecutor" in Peru. App. D at 20. Specifically, the Immigration Judge held that the adverse interest alleged by Petitioner arose from his brother's service with the Peruvian police from 1979 to 1985 (at which time his brother fled to Canada to avoid persecution). The Immigration Judge concluded that any potential harm to Petitioner by the Shining Path because he was the brother of a Peruvian police officer was not "on account of his race, religion, nationality, membership in a particular social group, or political opinion . . . ." *Id.* According to the Immigration Judge, because Petitioner's brother would not be eligible for asylum under the INA, it necessarily followed that Petitioner also would not be eligible for asylum based on the brother's traits imputed to Petitioner. Thus, the Immigration Judge denied asylum because none of the incidents occurred because Petitioner had some immutable trait or belief that he possessed which is protected by the INA.

The Immigration Judge further concluded that, because Petitioner did not satisfy the "reasonable possibility" standard for establishing eligibility for asylum, he necessarily could not meet the more stringent "clear probability" standard required to establish elibility for withholding of deportation. App. D at 22a.

Finally, the Immigration Judge concluded that Petitioner had failed to establish the element of "extreme hardship" required by the applicable statutory provision, INA § 244(a)(1), 8 U.S.C. § 1254(a). *Id.* at 22a-25a.

2. Decision of the BIA

Petitioner timely filed an appeal of the Immigration Judge's decision on May 12, 1994. On appeal, Petitioner argued, *inter alia*, that the Immigration Judge erred in concluding that he was not eligible for asylum because the persecution he would suffer was not on account of one of the enumerated grounds set forth in the INA. The BIA rejected Petitioner's argument, holding that Petitioner had failed to establish the elements necessary for asylum. In particular, the BIA concluded that Petitioner had failed to demonstrate that the Shining Path "is already aware, or could become aware, that the alien possesses" a belief protected by the INA. App. C at 11a (citing *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The BIA reasoned that, had the Shining Path known that Petitioner was the brother of a police officer (and not the police officer himself), then the Shining Path would not persecute him.

The BIA further held that any harm threatened to Petitioner based on his status as the brother of a police officer was not one of the grounds protected by the INA. Consequently, the BIA dismissed Petitioner's appeal.

3. Decision of the Fourth Circuit

Petitioner timely filed a Petition for Review of the BIA's decision with the Fourth Circuit Court of Appeals on August 11, 1997. Petitioner argued, *inter alia*, that the BIA erred in upholding the Immigration Judge's decision that Petitioner was not eligible for asylum. In a decision dated April 30, 1998, the Fourth Circuit panel affirmed the BIA's decision, concluding that the BIA's decision "is based on substantial evidence and is without reversible error." App. A at 2a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's affirmance of the BIA's decision creates a conflict among the federal Circuit Courts with respect to the statutory scope of asylum. Specifically, the Fourth Circuit has concluded in this case that a family is not cognizable as a "social group" within the meaning of the INA, and consequently, Petitioner's well-founded fear of persecution based on that status falls outside of the INA. In contrast, the First and Ninth Circuits have concluded the exact opposite. *See Gebremichael v. INS*, 10 F.3d 28, 35-37 (1st Cir. 1993) (holding that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family"); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (concluding that "a prototypical example of 'a particular social group' would consist of the immediate members of a certain family").

In the instant case, the Fourth Circuit upheld the BIA's conclusion that Petitioner is not eligible for asylum because "[t]he respondent's application is based on the fact that the guerillas in that country . . .intended to target his brother, who was a detective for the Peruvian police." App. A at 2a. To be sure, Petitioner bears a striking resemblance

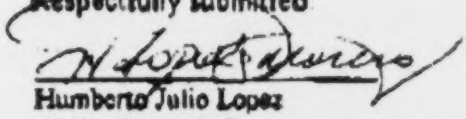
to his brother – an immutable characteristic that increases the likelihood of persecution – but that characteristic is not the sole basis for Petitioner's well-founded belief of persecution. The record evidence demonstrates that Petitioner's family relationship to his brother also raises the possibility of persecution, particularly since the prior attack just as likely resulted from Petitioner's family ties as from Petitioner's resemblance to his brother. Thus, it is Petitioner's familial ties to his brother, coupled with his resemblance, that forms the basis of his asylum claim.

The Fourth Circuit's holding, therefore, is at odds with the holding of other federal circuits that a nuclear family constitutes a "social group" under section 208(a) of the INA, 8 U.S.C. § 1158(a). This conflict creates a national disparity regarding the scope of the INA's asylum provisions. Intervention by this Court would permit a uniform interpretation of the relevant asylum provisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Pro Se

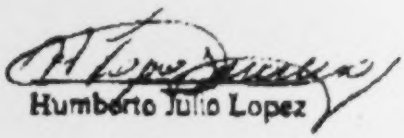
DECEMBER 13, 1998

Certificate of Service

This is to certify that on the 13th day of December 1998, I mailed the Petition for Writ of Certiorari to the following individuals via first-class mail, postage prepaid:

Susie Cho, Esq.
United States Department of Justice
Office of Immigration Litigation
Ben Franklin Station
P.O. Box 878
Washington, D.C. 20044

Solicitor General of the United States
Room 5614
Department of Justice
10th St. and Constitution Ave, N.W.
Washington, D.C. 20530



Humberto Julio Lopez

APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2039

HUMBERTO JULIO LOPEZ,

Petitioner,

versus

U.S. IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A70-311-657)

Submitted: March 17, 1998
Decided: April 30, 1998

Before HAMILTON, MICHAEL, and MOTZ, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Charles D. Yates, Rockville, Maryland, for Petitioner. Frank W. Hunger, Assistant Attorney General, Christopher C.

Fuller, Senior Litigation Counsel, Susie Cho, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Petitioner Humberto Lopez seeks review of the Board of Immigration Appeals' opinion and order dismissing his appeal and affirming the immigration judge's decision denying his applications for suspension of deportation, asylum, and withholding of deportation. Petitioner alleges that the Board erred in finding that he did not appeal the immigration judge's denial of his application for suspension of deportation. Petitioner also contends that the Board erred by finding that he failed to establish a well-founded fear of persecution and by affirming the denial of his motion to consolidate his deportation proceedings with his wife's. Finally, Petitioner asserts that he was denied the opportunity to present his case to t he immigration judge because the judge made his decision without hearing closing arguments from counsel. Our review of the record discloses that the Board's decision is based on substantial evidence and is without reversible error. See Lopez v. INS,, No. A70-311-657 (B.I.A. Aug. 6, 1997). Accordingly,, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

July 14, 1998

No. 97-2039

A70-311-657

HUMBERTO JULIO LOPEZ

Petitioner

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE

Respondent

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/

Patricia S. Connor

_____

CLERK

APPENDIX C

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A70 311 657 – Arlington
Date:

In re: HUMBERTO JULIO LOPEZ

IN DEPORTATION PROCEEDINGS

APPEAL ON BEHALF OF RESPONDENT:

Charles D. Yates, Esquire
966 Hungerford Drive, Suite 8-A
Rockville, Maryland 20850

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation

The respondent's appeal from an Immigration Judge's decision, dated January 14, 1994, denying his applications for asylum, withholding of deportation, and suspension of deportation, under sections 208, 243(h) and 244(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h), and 1254(a), but granting him voluntary departure under section 244(e) of the Act, 8 U.S.C. § 154(e), will be dismissed.[1]

---

[1] The respondent does not appeal the Immigration Judge's denial of the application for suspension of deportation. We will therefore limit our

The respondent is a 30-year-old male, native and citizen of Peru, who first entered the United States on April 15, 1986. The respondent states on his Notice of Appeal that the Immigration Judge erred in denying his motion to consolidate his case with his wife's case. He argues on appeal that the Immigration Judge erred and abused his discretion in not allowing the respondent's attorney the opportunity to present closing arguments at the hearing, and in finding that the respondent would not suffer persecution in Peru.[2] We are not convinced by the respondent's arguments.

RESPONDENT'S MOTION TO CONSOLIDATE

We note that the record contains a copy of the wife's Order to Show Cause, dated December 13, 1993, along with the respondent's Motion to Close Case and Merge with Wife's Pending Deportation. Across the front page of the motion, the Immigration Judge has written "DENIED" but has failed to give any reasons in his decision as to why he denied the motion. When a motion is denied, the Immigration Judge must identify and fully explain the reasons for such decision; otherwise, the parties are deprived of a fair opportunity to contest the Immigration Judge's determination on appeal, and the Board of Immigration Appeals is unable to

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decision to the appeal of the application for asylum and withholding of deportation.

[2] The respondent also argues on appeal that the Immigration Judge erred in finding (1) that the respondent did not have sufficient knowledge of events in Peru to make a judgment about the danger he would face in that country, and (2) that the respondent did not have a well-founded fear of persecution due to the decrease in the number of killings in that country. Given our finding and discussion below on the respondent's failure to show that he has a well-founded fear of persecution on account of any protected ground enumerated in the Act, we will not discuss these additional arguments presented by the respondent.

meaningfully exercise its responsibility of reviewing the decision in light of the arguments advanced on appeal. Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

The transcript of the hearing held January 14, 1994, reflects that the Immigration Judge denied the respondent's motion to consolidate because the respondent's applications for asylum and suspension of deportation were different from the wife's asylum application. The Immigration Judge found that these applications should have been heard separately because they were different forms of relief, and that consolidation would have led to further delay in the respondent's proceedings.

We have found that the regulations issued by the Attorney General do not specifically address the issue of joinder or consolidation of proceedings. Matter of Taerghodsi, 16 I&N Dec. 260 (BIA 1977), aff'd, 569 F.2d 1154 (5th Cir.) (unpublished table decision), cert. denied, 439 U.S. 829 (1978). However, under 8 C.F.R. § 242.8(a) an Immigration Judge may, subject to the requirements of procedural due process, consolidate the cases of different respondents if he deems it necessary to promote administrative efficiency. Id. It is within the power of the Immigration Judge to consolidate proceedings, if such consolidation does not serve to deny the respondent the right to fully and clearly litigate his claims. Id. It follows then that an Immigration Judge also has the power not to consolidate a respondent's case with another respondent, if leaving the cases separate would not deny the respondents the right to fully and clearly litigate their respective claims.

The respondent in the instant case argues that his case should have been consolidated with that of his wife, who apparently had a pending asylum case before the Immigration

Court. There is no indication on this record that the respondent's asylum and withholding of deportation application was related in any way to that of his wife. He claims that his persecution was based on account of the guerillas in Peru mistaking him for his brother, who was a detective in the police department of that country. The respondent has not established that any pertinent evidence was omitted from his asylum application because his wife's case was not consolidated with his.

In addition, there is no indication that the respondent's application for suspension of deportation lacked any pertinent evidence due to the fact that his wife's case had not been consolidated. Under section 244(a) of the Act, the respondent was required to demonstrate, inter alia, that his deportation to Peru would result in extreme hardship to himself or to his United States citizen or permanent resident spouse, child, or parent. The respondent admitted that his wife is neither a United States citizen nor a lawful permanent resident. Consequently, the respondent's wife would have no bearing on his application for suspension of deportation.

Moreover, the Immigration Judge found that it would serve administrative efficiency if the respondent's immigration case, constituting applications for asylum, withholding of deportation, and suspension of deportation, remained separate from his wife's case. Therefore, we find that there was no error in the Immigration Judge's decision not to consolidate the two cases.

RESPONDENT'S OPPORTUNITY TO PRESENT CLOSING ARGUMENTS

The respondent's contention that the Immigration Judge erred in not allowing his attorney the opportunity to present closing arguments at the hearing, is not persuasive. The respondent does not refer to any precedent to support his contention. Moreover, we note that statements or assertions by counsel are not evidence. Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980). Thus, we find that the respondent was not deprived a full and fair hearing on the evidence he presented in his case, and the Immigration Judge's action did not prejudice the respondent in any way.

RESPONDENT'S ASYLUM APPLICATION

The respondent also argues that the Immigration Judge erred in denying his application for asylum by finding that he did not establish a well-founded fear of persecution if returned to Peru. The respondent's application is based on the fact that the guerrillas in that country, Sendero Luminoso, intended to target his brother, who was a detective for the Peruvian police. Because the respondent closely resembles his brother in appearance, Sendero Luminoso made two attempts against the respondent's life thinking the respondent was his brother. The respondent managed to escape both attempts without harm.

After the first incident, which occurred in November 1985, the respondent went to live with some relatives. Once he felt that it was safe, he returned to his home. There was a second attempt on his life in February 1986, when Sendero Luminoso again mistook the respondent for his brother. At this point the respondent decided to flee the country, and he came to the United States. He stated that he could not

relocate in Peru because he did not want to impose on family and friends.

The respondent argues that he has a well-founded fear of persecution if he returned to Peru. To demonstrate a well-founded fear of persecution, the respondent would have to establish that his fear was on account of his race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge found that the respondent had not demonstrated that the persecution he would suffer was on account of one of the grounds enumerated in the Act. See sections 101(a)(42) and 208 of the Act.

The Immigration Judge stated that the respondent's brother would not be eligible for asylum under the facts of this case. The Immigration Judge relied on our holding in Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988), where we found that dangers which arise from the nature of employment as a policeman in an area of domestic unrest (e.g., attacks because they are viewed as extensions of a government's military forces) do not support a claim of a well-founded fear of persecution within the scope of section 208 of the Act. The Immigration Judge explained that because the respondent's brother would not be eligible for asylum under the facts presented, it follows that the respondent himself would not be eligible either.

The respondent argues on appeal that the holding in Matter of Fuentes, supra, should not be applied to him because he did not assume the dangers arising from being a policeman in Peru, as his brother had. He claims that he did not assume any risks, therefore, his case is distinguishable from the facts in Matter of Fuentes, supra.

Even if we were not to apply the holding of Matter of Fuentes to the respondent, his asylum application would still fail because he has not established that he has a well-founded fear of persecution on account of one of the reasons protected by the Act. To establish a well-founded fear of persecution, an asylum applicant must show that:

> (1) he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The respondent argues that the characteristic he possesses is his resemblance to his brother, and that for this reason he would be persecuted by Sendero Luminoso. The respondent's argument fails for at least two reasons. First, if the only reason, as asserted by the respondent, for Sendero Luminoso to target the respondent is because they have mistaken him for his brother, then the respondent has not established the second prong of the test. If Sendero Luminoso were aware of the respondent's true identity and of his close resemblance to his brother, the respondent would not be the subject of any kind of attack. The guerillas would focus on finding his brother. There is no indication that Sendero Luminoso would target the respondent for any other reason.

Second, the respondent has failed to establish that any harm that he might face would be on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42) of the Act. He has merely shown that the harm that would potentially come to him over 9 years after the last incident would be based on mistaken identity. This is not a ground protected by the Act. In addition, there is no evidence in the record indicating that Sendero Luminoso has imputed any political opinion on the respondent. Consequently, the respondent has failed to show that he has a well-founded fear of persecution if he returned to Peru.

Accordingly, the respondent's appeal must be dismissed.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
ARLINGTON, VIRGINIA

File No.:A70 311 657 JANUARY 14, 1994

In the Matter of

LOPEZ-MORENO, HUMBERTO JULIO)
IN DEPORTATION)
PROCEEDINGS)
)
Respondent)

CHARGE: Section 241(a)(1)(B) of the Immigration and Nationality Act, alien who entered the United States without inspection.

APPLICATIONS: Asylum, withholding of deportation, suspension of deportation, and voluntary departure.

APPEARANCES

FOR THE RESPONDENT: Charles D. Yates, Esq.
966 Hungerford Drive, Suite 8A
Rockville, Maryland 20850

FOR THE SERVICE: James H. Walsh, Esq.

U.S. INS
Arlington, Virginia

ORAL DECISION AND ORDER OF

THE IMMIGRATION JUDGE

The U.S. Immigration and Naturalization Service (hereinafter "Service") brought these deportation proceedings against the above-named respondent on October 6, 1992, pursuant to authority contained in Section 242 of the Immigration and Nationality Act (hereinafter "Act"). See 8 C.F.R. 3.14(a).

The respondent is a 28-year-old, married, male alien, a native and citizen of Peru, who entered the United States at Los Angeles, California on or about April 15, 1986, without inspection.

On February 5, 1993, the respondent, through counsel, admitted allegations of fact numbered one through four, inclusive, as set forth in the Order to Show Cause and Notice of Hearing. Exhibit 1. Based upon those admissions, the Immigration Court found that he was properly subject to deportation as an alien who had entered the United States without inspection. See Section 241(a)(1)(B) of the Act; see also 8 C.F.R. 242.14(a).

In relief of deportation, the respondent applied for asylum. He submitted a Request for Asylum in the United States. Exhibit 4. Pursuant to 8 C.F.R. 208.11, the Immigration Court secured an advisory opinion from the U.S. Department of State. Exhibit 5. An application for asylum made after institution of deportation proceedings shall be considered at the same time as application for withholding of

deportation. See 8 C.F.R. 208.3(b). The respondent also applied for suspension of deportation. Exhibit 2.

FACTS

The respondent's brother, i.e., Victor Lopez, served as a detective with the police department in Lima, Peru from 1979 to 1985. The respondent resembles his brother, having the same height, hair color, eye color, and weight.

Peru has been afflicted with violence brought about by an insurrectionary movement known as the Sendero Luminoso, or "Shining Path" in English. The Sendero targeted the respondent's brother because of his service with the police. Because of the respondent's physical resemblance to his brother, the Sendero allegedly threatened the respondent on two occasions, in the mistaken belied that he was in fact his brother. In November, 1985, two men, driving a car with a Sendero flag, stopped the respondent two blocks from his home. One of the men said to the other: "He is the policeman." The respondent was able to elude the assailants at that time, but he became fearful that the Sendero might try to harm him again in the belief that he was the brother who served with the police.

To avoid any further contact with the Sendero, the respondent went to live with his uncle and other family friends and relatives. But the respondent felt awkward about imposing himself on them. So, eventually he returned to his own home.

For a time, the respondent believed that he might not have any further contact with the Sendero. Unfortunately, this was not to be. In February, 1986, on his way home from

work in his father's truck, the respondent saw a young man standing near his home.. "Once this man saw the truck, and me in, he took out a revolver and aimed it towards the truck. I reacted by accelerating and moved to the opposite side of the road . . . ." Once again, the respondent managed to avoid harm at the hands of a Sendero member bent on harming him in the mistaken belief that he, i.e., the respondent, rather than his brother was the policeman.

After the second incident, the respondent decided to leave Peru. He entered the United States where he managed to avoid contact with the Service. Eventually, the respondent applied for asylum to the Service. When the Service denied his asylum application, it placed him into these proceedings.

The respondent is presently employed, part-time, as a newspaper distributor. At times in the past, he has worked as a building painter. Indeed, at one point the respondent attempted to secure a labor certification in that field, without success.

The respondent lives with his wife and two children, both of whom were born in the United States, in Bethesda, Maryland. The respondent and his wife work hard in order to support their family. The respondent has never been involved in any criminal activity in the United States. The respondent and his wife have managed to support their family without assistance from the federal government.

Both of the respondent's children are in good physical and mental condition. The respondent and his wife provide loving parent care for those children. The respondent also has a sister and brother living in the United States. The respondent's sister is a lawful permanent resident for the last eight years; his brother allegedly is in the process of obtaining such status for himself.

Owing to the lack of a Social Security number, the respondent has been unable to file tax returns in the United States. Eventually, it was his desire to obtain a Social Security number that led the respondent to apply for asylum to the Service. As a result, the respondent was able to obtain a Social Security number when he obtained permission to work in this country from the Service. Since the time respondent obtained a Social Security number, he has filed income tax returns and paid all taxes required

Other than his cars, the respondent does not own any property in the United States. He is not a member of any groups, clubs, or organizations in the United States; nor is there any evidence that he has performed volunteer work in behalf of any such organization.

The respondent's father, grandmother, and one of his brothers continue to live in Peru. The respondent, however, stated that he does not wish to return to Peru. The respondent, however, stated that he does not wish to return to Peru. He alleged that he could possibly be harmed in that country. Moreover, he alleged that his two U.S. citizen children, who have not had the experience of living in that country, would suffer hardship if required to leave the United States.

THE LAW OF ASYLUM

The burden of proof is one the applicant for asylum to establish that he is a refugee as defined in Section 101(a)(42) of the Act. The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. 208.13(a).

The applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution. 8 C.F.R. 208.13(b).

An applicant shall be found to have a well-founded fear of persecution if he can establish first, that he has a fear of persecution in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion; second, that there is a reasonable possibility of actually suffering such persecution if he were to return to avail himself of the protection of that country because of such fear. 8 C.F.R. 208.13(b)(2).

To receive asylum, an applicant must also show that he is worthy of favorable exercise of administrative discretion. Section 208(a) of the Act.

THE LAW OF WITHHOLDING OF DEPORTATION

The burden of proof is on the applicant for withholding of deportation to establish that his life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. The applicant's life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. 208.16(b)(1).

COUNTRY CONDITIONS

The restoration of democratic rule in Peru, which was interrupted by President Alberto Fujimori's April, 1992,, coup, was advanced by government actions in 1993. Successes in the campaign against terrorism led to significant

reductions in political violence, and there were positive improvements in the human rights situation, particularly a greatly reduced number of disappearances of suspected terrorists. However, major problems in the government's observance of human rights remain, including lack of due process in terrorism trials, continued (although fewer) extrajudicial killings, and disappearances, and limited persecution of human rights abuses by government agents.

Throughout Peru during 1993, the level of political violence remained high, although violence lessened compared to a similar period in 1992. Human rights monitors reported that since January, 1993, over 1,000 persons were killed in 793 terrorism-related incidents. Terrorists, primarily the Shining Path guerrillas, were blamed for killing 263 people while an estimated 400 subversives were killed by security forces.

The most important government success against the terrorists to date was the arrest and imprisonment in September, 1992, of Carlos Avimael Guzman, the founder, leader, and chief strategist of the Shining Path, along with several other leaders of that brutal organization.

An election for a constituent congress was held in November, 1992, and although the two major parties boycotted the elections, international observers found them to have been conducted fairly. Their congress drafted a new constitution, which was approved in a referendum on October 31, 1993. The new constitution will further strengthen presidential power and may also lead to a more independent judiciary.

The recent setback suffered by the Shining Path has reduced its capability, and only those who the guerillas

consider to be their most important enemies are likely to be in danger.

RESPONDENT'S CREDIBILITY

With regard to the respondent's assertions relating to his suspension of deportation claim, the Immigration Court found no reason to question his veracity. With regard to his claim of persecution, however, the Immigration Court found that the respondent's judgment regarding present conditions in Peru is one unaccompanied by any firsthand experience. In fact, the respondent has been in the United States since 1986; he has no information upon which to base a judgment that he would be in danger from the Shining Path if he returned to Peru at the present time.

ANALYSIS OF THE ASYLUM CLAIM

The respondent failed to demonstrate that he possessed an immutable trait of belief that he was of adverse interest to a potential persecutor in Honduras. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The Board at the Immigration Appeals has held that dangers which arise from the nature of employment as a policeman in an area of domestic arrest do not support a claim of well-founded of "persecution" within the meaning of the Act. See Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). In this case, the alleged adverse interest of the Shining Path in the respondent's brother was wholly attributable to the fact that the respondent's brother had served with the police from 1979 to 1985. Since the respondent's brother faced no threat of "persecution" as that term is defined by the law, it follows that the respondent himself faced no such threat of

persecution on account of the alleged misidentification of the Shining Path. If, as the respondent alleged, the Shining Path sought to harm him in the belief that he was his brother, a member of the Lima police force, then the respondent faced no danger on account of his race, religion, nationality, membership in a particular social group, or political opinion; rather, the respondent faced a danger because of the erroneous belief that he and not his brother was a member of the police force.

Both of the incident recounted by the respondent originated because the Shining Path allegedly thought that he was a member of the police force. In neither of these incidents was there any evidence that the Shining Path had an interest in the respondent due to some immutable trait or belief that he possesses which is protected by the Act.

Assuming arguendo, that the respondent had a reason to fear persecution from the Shining Path, there was no evidence that the threat was country-wide. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). In fact, the U.S. Department of State reported that there is a possibility of internal relocation for citizens of Peru. "Although the police and military are spread too thinly to protect everyone threatened by the Shining Path, Peru is a large, rugged country, and the guerrillas operate with relatively unsophisticated communications. There is no evidence that a nationwide guerrilla information network for tracking its perceived opponents exists." Exhibit 4 at 4.

Further, assuming arguendo that the respondent had some reason to fear "persecution" from the Shining Path, the objective evidence establishes that there has been an improvement in the situation in Peru. The ability of the Shining Path to mount operations against it's perceived

respondent has resided in the United States for only one year beyond the statutory minimum of seven required for eligibility for suspension of deportation; there was o showing of an unusually long period of residence in the United States, that would tend to support his claim of "extreme hardship."

While the respondent has family ties to the United States, principally consisting of his two U.S. citizen children, there is no evidence that he has relatives in Peru who can receive him and his family and aid him in readjusting to life in that country.

The civil unrest that has racked Peru for the last several years, while not fully abated, has substantially lessened. Moreover, the respondent is free to try to find an area in Peru in which the danger from the Shining Path is at a minimum. There is no evidence, as noted supra, that the respondent would face any threat of "persecution" if returned to Peru. The general conditions of political unrest, and the prospect of a reduced standard of living, conditions afflicting all aliens returnable to Peru from the United States, do not by themselves constitute a basis for a finding of "extreme hardship." See Santana-Fiqueroa v. InS, 644 F.2d 1354 (9th Cir. 1981).

The departure of the respondent from the United States would not necessarily require that his U.S. citizen children be removed from this country. That would be a decision undertaken by the respondent and his wife. Assuming arguendo that the respondent decided to take his children with him to Peru, there was no evidence in this record to indicate that the children would suffer "extreme hardship" if forced to go to that country. The children are in good physical condition; they are of such tender years that they would be able to make the adjustment to life in the

culture of Peru. Furthermore, while the economic and political conditions in Peru are different from those existing in the United States, there was no evidence that those conditions would be so oppressive as to create "extreme hardship" for the children of the respondent. The mere fact that the respondent has had children born to him in the United States while living in this country illegally, does not by itself require a finding of "extreme hardship" to himself or those children.

There was no basis in the evidence of this case for a finding of "extreme hardship" to the applicant or his U.S. citizen children as required or suspension of deportation. although there was no impediment to a finding of good morale character or continuous physical presence in this case, the lack of evidence to support a finding of "extreme hardship" requires that his application for suspension of deportation be denied.

VOLUNTARY DEPARTURE

To be eligible for voluntary departure, an applicant must show that he has been a person of good morale character for at least five years immediately proceeding his application, and that he has the immediate means with which to depart promptly from the United States. Further, the applicant must demonstrate that he is worthy of favorable exercise of administrative discretion. See Section 244(z) of the Act; see also 8 C.F.R. 244.1.

In this case, the respondent is eligible for voluntary departure both as a matter of law and discretion. Although the respondent entered the United States without inspection, and worked in this country at times without authority, he has also shown many positive factors in his life during the last seven years. There was no evidence that he engaged in any criminal conduct or further violations of the immigration laws.

The respondent is the father of two U.S. citizen children. In light of his good conduct for the last seven years, the Immigration Court will exercise administrative discretion for the limited purpose of voluntary departure.

ORDERS

ORDER: The respondent's application for asylum is denied.

ORDER: The respondent's application for withholding of deportation is denied.

ORDER: The respondent's application for suspension of deportation is denied.

ORDER: The respondent's application for voluntary departure is granted through and including April 1, 1994.

ORDER: If the respondent does not depart from the United States on or before April 1, 1994, or any extension granted by the Service, he shall be deported to Peru.

/S/

CRAIG DEBERNARDIS
Immigration Judge